2000

# Central Florida Investments, Inc. v. Park West Associates and Beaver Creek Associates : Brief of Appellee

Utah Supreme Court


Mark R. Gaylord; Craig H. Howe; Ballard Spahr Andrews & Ingersoll, LLP; Attorneys for Appellants.
Robert W. Payne; Todd M. Shaughnessy; Snell & Wilmer, L.L.P.; Attorneys for Appellees.

**IN THE UTAH SUPREME COURT**

| | |
|---|---|
| CENTRAL FLORIDA INVESTMENTS, INC.,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>PARK WEST ASSOCIATES and BEAVER CREEK ASSOCIATES,<br><br>Defendants/Appellants. | Appellate Court No. 20000558-SC<br>Trial Court No. 990600361-CR<br><br>Priority No. 15 |

# BRIEF OF APPELLEE

Appeal from Third Judicial District Court, Summit County,
Judge Robert Hilder


Mark R. Gaylord
Craig H. Howe
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
201 South Main Street, Suite 600
Salt Lake City, Utah 84111-2221
Attorneys for Defendants/Appellants

Robert W. Payne (5534)
Todd M. Shaughnessy (6651)
SNELL & WILMER, L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Telephone: (801) 257-1927
Attorneys for Plaintiffs/Appellees

**IN THE UTAH SUPREME COURT**

| | |
|---|---|
| CENTRAL FLORIDA INVESTMENTS, INC.,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>PARK WEST ASSOCIATES and BEAVER CREEK ASSOCIATES,<br><br>Defendants/Appellants. | Appellate Court No. 20000558-SC<br>Trial Court No. 990600361-CR<br><br>Priority No. 15 |

# BRIEF OF APPELLEE

Appeal from Third Judicial District Court, Summit County,
Judge Robert Hilder


Mark R. Gaylord
Craig H. Howe
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
201 South Main Street, Suite 600
Salt Lake City, Utah 84111-2221
Attorneys for Defendants/Appellants

Robert W. Payne (5534)
Todd M. Shaughnessy (6651)
SNELL & WILMER, L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Telephone: (801) 257-1927
Attorneys for Plaintiffs/Appellees

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

### FEDERAL CASES



### STATE CASES

**STATE STATUTES**



**MISCELLANEOUS**

## STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) and § 78-31a-19(1).

## STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Whether District Court Judge Robert Hilder properly denied Park West Associates' and Beaver Creek Associates' (hereinafter collectively "Park West") Motion to Compel Arbitration on the bases that the "arbitration" provision in the parties contract failed to provide for meaningful arbitration and failed to provide CFI with any meaningful remedy.

"A trial court's denial of a motion to compel arbitration presents a question of law which [appellate courts] review for correctness." Sosa v. Paulos, 924 P.2d 357, 360 (Utah 1996).

2. Whether Judge Hilder's ruling should also be affirmed on the basis that the instant dispute between CFI and Park West does not fall within the ambit of the "arbitration" provision in the parties' contract. "It is well settled that an appellate court may affirm a 'judgment, order or decree appealed from if it is sustainable on any legal ground or theory apparent on the record,' even though that ground or theory was no identified by the lower court as a basis for the ruling." Orton v. Carter, 970 P.2d 1254, 1260 (Utah 1998) (quoting Limb v. Federated Milk Producers Ass'n, 23 Utah 2d 222, 225 n.2, 461 P.2d 290, 293 n.2 (1969)).

3. Whether Judge Hilder's ruling should also be affirmed on the basis that Park West waived any right it may have had to seek arbitration in this case. "It is well settled that an appellate court may affirm a 'judgment, order or decree appealed from if it is sustainable on any legal ground or theory apparent on the record,' even though that ground or theory was not identified by the lower court as a basis for the ruling." Orton v. Carter, 970 P.2d 1254, 1260

(Utah 1998) (quoting Limb v. Federated Milk Producers Ass'n, 23 Utah 2d 222, 225 n.2, 461 P.2d 290, 293 n.2 (1969)).

## DETERMINATIVE STATUTES

Section § 78-31a-4(1) of the Utah Arbitration Act provides in pertinent part:

> "If an issue is raised concerning the existence of an arbitration agreement or the scope of the matters covered by the agreement, the court shall determine those issues and order or deny arbitration accordingly."

Utah Code Ann. § 78-31a-4(1)

Section 78-31b-2(4) of the Alternative Dispute Resolution Act provides:

> "Arbitration means a private hearing before a neutral or panel of neutrals who hear the evidence, consider the contentions of the parties, and enter a written award to resolve the issues presented pursuant to Section 78-31b-6."

Utah Code Ann. § 78-31b-2(4).

## STATEMENT OF THE CASE

### Nature of the Case

On June 14, 1998, Park West and CFI entered into a real estate purchase contract (the "Contract") by which Park West agreed to sell, and CFI agreed to purchase, a twenty-acre parcel of property in the Canyon Meadows Development in Summit County (the "Frostwood Parcel") for Fifteen Million Dollars ($15,000,000). Park West breached the Contract by failing to comply with the terms and conditions of the Contract and by pursuing, instead, an alternative buyer for the property. Park West wrongfully terminated the Contract and pursued development of the Frostwood Parcel with another developer. CFI sued Park West for breach of contract and sought specific performance of the Contract. Park West filed a counterclaim against CFI asserting five causes of action including a quiet title claim, a breach of contract claim, a claim for breach of the

covenant of good faith and fair dealing, a claim of waiver and estoppel, and a claim for wrongful lien.

## Course of Proceedings and Disposition Below

On November 9, 1999, CFI filed a Complaint in the Third District Court against Park West seeking specific performance of the Contract and damages for Park West's breach of that Contract. (R. 1-7). On December 7, 1999, Park West filed its Answer and Counterclaim seeking, among other things, to quiet title to the Frostwood Parcel. (R. 17-57). On December 8, 1999, Park West filed a Motion to Dismiss, seeking the dismissal of CFI's Complaint in its entirety. On January 10, 2000, the trial court heard arguments on Park West's Motion to Dismiss. (R. 58-204). On January 14, 2000, the trial court issued a Minute Entry in which it dismissed CFI's claim for specific performance but not its claim for damages. (R. 423-426). The Minute Entry was reduced to a formal order on February 28, 2000. (R. 461-477). On February 4, 2000, the parties participated in an attorney's planning conference and agreed upon dates for the litigation. (R. 510-512). On February 4, 2000, the parties submitted their stipulated Scheduling Order to the trial court. (R. 449-451). On March 3, 2000, the parties exchanged their Initial Disclosures. (R. 478-479). On March 9, 2000, Park West filed a Motion to Compel Arbitration. (R. 483-509). Park West's Motion to Compel Arbitration was argued to the trial court on May 17, 2000. (R. 548). The trial court denied Park West's motion and a formal order was signed by the Court on May 25, 2000. (549-551). On June 22, 2000, CFI served its first set of discovery requests on Park West. (R. 556). On June 23, 2000, Park West filed its Notice of Appeal of the order denying its motion to compel. (R. 552-555). On July 7, 2000, Park West filed a Motion to Stay Proceedings or, Alternatively, Motion for a Protective Order. (R. 576-585). The motion was heard by the trial court on August 16, 2000, and a formal order denying

the motion was issued on September 5, 2000. (R. 768-770). On September 12, 2000, Park West filed a Motion to Stay Proceedings Pending Appeal with this Court which the Court granted on October 17, 2000.

## Statement of Relevant Facts

### The Underlying Dispute

In approximately December of 1997, CFI, a condominium resort developer, began negotiations with Park West to purchase a parcel of property in Summit County which included the Frostwood Parcel. The Frostwood Parcel was an attractive investment to CFI because Park West was offering the property with all of the necessary zoning and permitting requirements in place. (See Affidavit of David Siegel ("Siegel Affid."), ¶ 7, R. 270). Between December of 1997 and June of 1998, the parties worked out the details of the transaction. (Id., ¶¶ 7-12, R. 270-271). On or about June 14, 1998, CFI and Park West executed a Real Estate Purchase Contract (the "Contract") which provided for the sale of the Frostwood Parcel to CFI for Fifteen Million Dollars ($15,000,000). ( A true and correct copy of the Contract is attached hereto as Exhibit A, R. 279-284)). CFI paid Park West an earnest money deposit of $50,000. (Siegel Affid., ¶ 10, R. 271.).

The sale was scheduled to close on or before December 31, 1998, before which time Park West was to obtain all of the necessary governmental approvals for CFI's planned condominium development. (Id. at ¶ 18, R. 272-273 & 279-284). Between June and December CFI expended significant time and resources preparing for the development of the condominium project on the Frostwood Parcel. (Id. at 16, R. 272). Despite Park West's promises, it failed diligently to pursue the necessary governmental approvals, allowed the time for closing to lapse, and pursued

another purchaser for the Frostwood Parcel. (Id. at ¶¶ 18-28, R. 227-275). CFI initiated its lawsuit against Park West for specific performance and breach of contract. (Id. at ¶ 28, R. 275).

The Contract's Dispute Resolution Provisions

The Contract, including its Addendum No. 1, was prepared and signed by the parties on or about June 14, 1998. (R. 279-284). Addendum 1 to the Contract was not an amendment and/or modification of the Contract, but rather, an integral part of the Contract which contained additional terms and clarifications. (Siegel Affid., ¶ 13, R. 271-272).

The Contract contains three provisions relating to the resolution of disputes. Those provisions are found in Sections 15 and 16 of the main body to the Contract and Paragraph 12 of Addendum 1. Section 15 of the Contract provides in pertinent part as follows:

> DISPUTE RESOLUTION. The parties agree that any dispute or claim relating to this Contract, including but not limited the disposition of the Earnest Money Deposit and the breach or termination of this Contract, shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. . . . If mediation fails, the procedures applicable to and remedies available under this Contract shall apply. Nothing in this provision shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court, serving it on the Seller by means of a summons or otherwise permitted by law, and recording a lis pendens with regard to the action provided that the Buyer permits the Seller to refrain from answering the complaint pending mediation. The parties may agree in writing to waive mediation.

(R. 282) (emphasis added). Section 16 of the Contract further provides that if Seller defaults under the Contract, Buyer may "sue Seller for specific performance and/or damages." (R. 282). Paragraph 12 of Addendum 1 to the Contract relates to one particular type of dispute—disagreements over terms. Section 12 provides:

> Any disagreement over the terms of this agreement shall be arbitrated by the parties agreed upon by both parties. If agreement cannot be reached within 60 days from the beginning of an arbitration process Buyer shall receive its money back and this agreement shall be null and void.

(R. 283) (emphasis added).

CFI understood Section 12 of Addendum 1 to apply in only one circumstance—when the parties needed quickly to resolve a disagreement over the terms of the Contract. CFI did not understand Section 12 to limit its right to pursue litigation against Park West if Park West breached the Contract and refused to perform. CFI intended to retain its right to sue Park West for breach of contract. (Siegel Affid., ¶¶ 30-31, R. 275).

On or about the day the Contract was signed, Park West took care to see that provisions of the Contract were consistent by crossing out certain provisions that were in conflict with other provisions in the Contract. (Id. at ¶ 14, R. 272). Although Park West crossed out certain provision in the Contract, it did not cross out any provision relating to resolution of disputes. (Id.)

Paragraph 12 of Addendum 1 does not contemplate a binding award from neutral arbitrators. Rather, the provision contemplates resolution by "agreement" of the parties which agreement must occur within sixty (60) days. (R. 283). At the hearing on Park West's motion to compel, Park West's counsel acknowledged: "The exclusive remedy under this arbitration clause is that if they don't reach agreement, it's null and void." (R. 741, ll. 13-14) (emphasis added). See generally the discussion between Judge Hilder and Mark Gaylord at R. 738-742, a copy of which is attached hereto as Exhibit "B."

Park West's Pursuit of Litigation Rather Than Arbitration

On November 9, 1999, CFI filed its Complaint for breach of contract, specific performance and damages. In the Complaint, CFI articulated its willingness to pursue mediation with Park West and provided that defendants could refrain from answering the Complaint pending the outcome of the mediation. (R. 1-7)

On December 8, 1999, rather than pursuing mediation with CFI, Park West served its Answer and Counterclaim to the Complaint. The Answer included fourteen affirmative defenses. Nowhere in the Answer or in any of the affirmative defenses, did Park West assert that Paragraph 12 of Addendum 1 to the Contract barred CFI's lawsuit. (R. 50-57).

Although Park West mentioned in its Counterclaim the existence of Paragraph 12, it made no claims based upon that provision. Instead, it asserted five causes of action against CFI seeking judgment from the trial court on substantive issues including: 1) a judgment that the Contract terminated by its own terms, that the lis pendens was void, and that title to the property in dispute should be quieted in Park West (R. 39, ¶ 46); 2) a judgment that the lis pendens was a wrongful lien (R. 37, ¶ 55); 3) a judgment that CFI delayed in bringing the action and has waived its right to assert its claims (R. 36, ¶ 60); 4) a judgment that CFI breached the covenant of good faith and fair dealing in the Contract (R. 36, ¶ 63); and 5) a judgment that CFI breached the Contract by failing to submit documentation required under the Contract (R. 35, ¶ 67). Park West, in its Counterclaim, also affirmatively alleged that jurisdiction and venue were proper in the trial court. (R. 49, ¶¶ 4-5). Park West has never filed a demand for arbitration with the AAA or any other entity.

On December 8, 1999, instead of filing a motion to compel arbitration, Park West filed a Motion to Dismiss and to Quiet Title. (R. 59-115). Although styled as a motion to dismiss, the motion was supported with nine affidavits. (R. 116-188). Consequently, Judge Hilder properly treated the Motion to Dismiss as a motion for summary judgment. (R. 462). The relief set forth in Park West's Motion to Dismiss was very specific and sought a complete resolution of all

substantive issues in the case: The motion stated:

> This is an action seeking specific performance of a real estate purchase contract that automatically terminated by its own terms over eleven months ago. The contract provided that closing would occur on the earlier of December 31, 1998 or fifteen days after Final Master Plan approval, that the "[e]ntire agreement [was] subject to Summit County Approval of density, zoning and use," and that time was of the essence. Because Summit County never gave its approval, and the transaction failed to close by December 31, 1998, the Purchase Contract automatically terminated by its own terms on December 31, 1998. Therefore, PWA respectfully requests this Court dismiss this action, with prejudice, on the grounds that CFI cannot state a claim upon which relief may be granted.

(R. 60) (emphasis added). A true and correct copy of Park West's Motion to Dismiss is attached hereto as Exhibit "C." At the hearing on Park West's Motion to Dismiss, counsel for Park West repeatedly emphasized that Park West was seeking a dismissal of the action, not an order from the Court compelling arbitration. (See R. 662, ll. 21-22; R. 685, ll. 19-24; R. 728, l. 20 to 729, l. 1).

In a Minute Entry dated January 14, 2000, the Court partially granted Park West's motion dismissing CFI's claim for specific performance and ordering the release of the lis pendens. The Court allowed CFI to proceed on its claim for breach of contract and damages. (R. 423-426). The ruling was reduced to a formal order on February 28, 2000. (R. 461-465).

After the trial court issued its minute entry on Park West's motion to compel, Park West continued to participate in the litigation. On February 4, 2000, attorneys for CFI and for Park West participated in a Rule 26(f) attorney's scheduling conference. In that conference, Park West and CFI discussed the nature of the claims and defenses, agreed upon a date for the exchange of initial disclosures and set various dates for the litigation. At no time during the attorney's planning conference did Park West's counsel indicate that Park West would be

moving to compel arbitration and did not intend to proceed with the litigation as scheduled. (R. 510-512). On February 4, 2000, Park West's counsel executed the proposed Scheduling Order which was submitted to the Court. The order contained no reference to arbitration. (R. 449-451). A true and correct copy of the Scheduling Order is attached hereto as Exhibit "D." On March 3, 2000, the parties exchanged their initial disclosures. (R. 478-479). Nowhere in Park West's initial disclosures did Park West indicate its intent to pursue arbitration and seek dismissal of this action

On March 9, 2000, Park West filed its first Motion to Compel Arbitration. (R. 483-509). By the time this motion was filed, Park West had filed and served approximately thirty pleadings and other papers. (R. 8-13, 17-209, 215-256, 418-421, 449-451, 454-465 & 478-479). CFI had filed and served approximately 13 pleadings and other papers, most of which were responding to papers submitted by Park West. (R. 1-7, 14-16, 210, 211-212, 257-354, 358-417, 428-439 & 446-448). By the Motion to Compel, the record already consisted of 482 pages of documents (R. 1-482).

Prior to the filing of Park West's Motion to Compel Arbitration, CFI incurred substantial legal fees responding to Park West's counterclaim, briefing and arguing Park West's Motion to Dismiss, discussing the claims and defense and negotiating a Scheduling Order for the action, preparing initial disclosures, and preparing discovery to be served in the action. (R. 510-512)

## SUMMARY OF ARGUMENTS

Judge Hilder properly concluded that Paragraph 12 of Addendum 1 to the Contract did not provide CFI with a meaningful option to arbitrate. Judge Hilder also recognized that Paragraph 12, as interpreted by Park West, provided CFI with no remedy for its breach of

contract claims. Both of these arguments provided a proper basis upon which to deny Park West's Motion to Compel. Therefore, this Court should affirm the decision of the trial court.

Even if Paragraph 12 was a valid arbitration provision, which it is not, that provision was only intended to apply to legitimate disagreements over the terms of the parties' Contract. It was not intended to apply to claims for breach of contract and for termination, which claims were specifically referenced in, and governed by, Sections 15 and 16 of the Contract. Therefore, the Court may affirm the decision of the trial court on this alternative ground.

Even if Paragraph 12 had provided for meaningful arbitration, which it did not, and even if CFI's claims for breach of Contract had fallen under that provision, which they do not, Park West waived its right to pursue arbitration long before it filed its Motion to Compel. By answering CFI's Complaint without asserting the right of arbitration, filing multiple counterclaims against CFI for affirmative relief, moving for the complete dismissal of all CFI's claims and to quiet title to the Frostwood Parcel, and by participating in scheduling, initial disclosures and other aspects of the litigation, Park West participated in the litigation to a point inconsistent with the intent to arbitrate. CFI has been prejudiced by Park West's substantial participation in the litigation. Therefore, the Court may affirm the decision of the trial court on this alternative ground of waiver.

## ARGUMENT

In the trial court, CFI presented the Court with two bases upon which to deny Park West's Motion to Compel Arbitration. First, CFI argued that Park West had waived any right it may have had to arbitrate by its aggressive litigation tactics and failure to timely pursue arbitration. Second, CFI argued that the clear language of the Contract entitled CFI to pursue litigation for its breach of contract claims and that the "arbitration" provision in the Contract

simply does not apply to those claims. Judge Hilder denied Park West's motion on the alternative grounds that the "arbitration" provision relied upon by Park West does not provide for true arbitration and does not provide CFI with an adequate remedy for CFI's breach of contract claims. Each of these arguments is sufficient in and of itself to support the trial court's decision.[1]

## I. THE DISTRICT COURT PROPERLY DENIED PARK WEST'S MOTION TO COMPEL ARBITRATION FOR THE REASONS PROVIDED BY JUDGE HILDER.

### A. Paragraph 12 Does Not Provide CFI With A Meaningful Arbitration Option.

It is well settled in this State that a party cannot be compelled to arbitrate its contract disputes unless it has expressly agreed to arbitration. As this Court has recognized, while there is a public policy which favors arbitration as a speedy and inexpensive method of resolving controversies, "these considerations cannot outweigh the constitutional right of access to the courts unless one waives that right." Jenkins v. Percival, 962 P.2d 796, 799 (Utah 1998).

> "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Tech., Inc. v. Communications Workers, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986). This is because "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 1923, 131 L.Ed. 2d 985 (1995). Thus, "although there is a presumption in favor of arbitration, a party will not be required to arbitrate when it has not agreed to do so." Tropical Cruise Lines, S.A. v. Vesta Ins. Co., 805 F. Supp. 409, 412 (S.D. Miss. 1992) (citations omitted). "We must first conclude that arbitration is a remedy which has been bargained for by the parties. Only when such agreement on arbitration exists may we encourage arbitration by liberal interpretation of the arbitration provisions themselves." Reed v. Davis School Dist., 892 P.2d 1063, 1065 (Utah Ct. App. 1995).

Cade v. Zions First Nat'l Bank, 956 P.2d 1073, 1077 (Utah Ct. App. 1995).

[1] This Court may affirm the trial Court on any appropriate basis. Orton v. Carter, 970 P.2d 1254, 1260 (Utah 1998).

The question before this Court is whether Paragraph 12 of Addendum 1 to the Contract provides a meaningful arbitration option. The answer lies in the definition of "arbitration." Park West attempts to compel arbitration under the authority of the Utah Arbitration Act. That Act does not contain a definition of "arbitration," however, it presumes that an "award" will be rendered and requires that "[t]he arbitration award shall be in writing." Utah Code Ann. § 78-31a-10 (1985). The Alternative Dispute Resolution Act, a close companion to the Utah Arbitration Act, defines "arbitration" as "a private hearing before a neutral or panel of neutrals who hear the evidence, consider the contentions of the parties, and enter a written award to resolve the issues presented pursuant to Section 78-31b-6." (Utah Code Ann. § 78-31b-2(4) (emphasis added). Blacks Law Dictionary defines arbitration as "[a] method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding." Blacks Law Dictionary (7th ed. 1999) (emphasis added). Webster's defines "arbitration" as "the hearing and determination of a dispute or the settling of differences between parties by a person or persons chosen or agreed to by them." Random House Webster's Collegiate Dictionary (1999) (emphasis added). Finally, the Utah Court of Appeals has recognized that "[a]rbitration customarily results in an award which is enforceable by filing with the district court and confirmation of the award. Arbitration always includes presentation of the conflicting claims to a neutral third party or panel for resolution." Reed v. Davis County School District, 892 P.2d 1063, 1065 (Utah Ct. App. 1995) (emphasis added) (citations omitted)(arbitration unnecessary because the elements had not been met). It is evident from all of these sources, that arbitration involves a process that results in a "decision" and/or "award" from the arbitrator.

Paragraph 12 of Addendum 1 to the Contract, simply does not provide for a true arbitration process and CFI has acknowledged as much. Paragraph 12 provides:

> Any disagreement over the terms of this agreement shall be arbitrated by parties agreed upon by both the Buyer and the Seller. If agreement cannot be reached within 60 days from the beginning of the arbitration process Buyer shall receive its money back and this agreement shall be null and void.

(Exhibit A, Addendum 1, Paragraph 12). Although Paragraph 12 uses the term "arbitrate," it does not require any kind of determination by neutral third parties and does not contemplate an award. To the contrary, the only resolution contemplated in the provision, if any, is a resolution by "agreement." Park West's counsel, Mark Gaylord, conceded at the hearing that Paragraph 12 is not an arbitration provision. During the hearing Judge Hilder asked Mr. Gaylord: "But you don't reach agreement on an arbitration, do you, Mr. Gaylord? It's imposed upon you." (R. 738, ll. 20-21). Mr. Gaylord had no choice but to concede: "Ordinarily, yes your Honor." (R. 738, l. 22). Later in the hearing Mr. Gaylord acknowledged that "[t]he exclusive remedy under this arbitration clause is that if they don't reach agreement, it's null and void." (R. 741, ll. 13-14) (emphasis added). Judge Hilder properly recognized that resolution by "agreement" was not arbitration and, therefore, the trial court could not compel CFI to arbitrate its claims for breach of contract.

On appeal, Park West argues that Paragraph 12 of the Addendum provides for arbitration but simply limits the scope of the arbitrator's authority and the amount of time in which the arbitration can occur. CFI does not dispute the general proposition that parties may define the scope of an arbitrator's authority and the amount of time for an arbitration. However, Paragraph 12, as interpreted by Park West, does much more than that. It divests the arbitrator of any

authority, does away with a meaningful arbitration award, and leaves any "dispute resolution" to the "agreement" of the parties, if at all.

Park West attempts to support its position by citing three cases from other jurisdictions—Colorado, Hawaii and Alaska. None of Park West's cases have any binding effect in Utah. More importantly, none of them support Park West's position. In the Colorado case, the dispute involved the appointment of an arbitrator affiliated with one of the parties. City and County of Denver v. District Court, 939 P.2d 1353 (Colo. 1997). The Colorado Court concluded that the parties could contract to use a non-neutral arbitrator "so long as the ADR clause provides for judicial review of the official's determination." Id. at 1365. Significantly, the provision in that contract contemplated that the dispute would be resolved, not by "agreement" but by the arbitrator who would "determine the merits of PCL's claims." Id. Thus, City and County of Denver has no application to this case.

In the Hawaii case cited by Park West, the arbitration clause, unlike Paragraph 12 here, provided for an award by a neutral third party. In re Clawson, 783 P.2d 1230 (Hawaii 1989). The parties modified this clause by agreeing to retract the arbitration if the parties settled their dispute before the issuance of the arbitration award. Id. at 1231. The question on appeal was whether the parties had reached a settlement before the arbitrator issued his ruling. Id. If so, the award would be vacated. If not, the award would stand. Id. at 1232. Because In re Clawson provided for valid binding arbitration in the event of no "agreement," that case does not support Park West's interpretation and application of Paragraph 12.

Finally, in the Alaska case, the question was whether the arbitrator had exceeded its authority in making a particular award. Board of Education v. Ewig, 609 P.2d 10, 13 (Alaska 1980). Although the Alaska court recognized that parties are free to define the scope of the

arbitrator's authority, the court concluded that the arbitrator had fashioned a proper remedy for the aggrieved party. Id. at 13-14. Nothing in the Ewig case suggests that parties can contract for an "arbitration" procedure that divests the arbitrator of any authority to decide the merits of the dispute and provides for no enforceable award. Park West cites the Court to no authority from Utah or from any other jurisdiction to support its unique interpretation of the law regarding arbitration.

Before the trial court could compel CFI to arbitrate its claims for breach of contract, the court had to determine that CFI and Park West had bargained for arbitration. Jenkins v. Percival, 962 P.2d 796, 799 (Utah 1998); Cade v. Zions First Nat'l Bank, 956 P.2d 1073, 1077 (Utah Ct. App. 1995). Because Paragraph 12 provides for resolution by "agreement," rather than by an award or decision from an arbitrator, Paragraph 12 is not an arbitration provision. Therefore, Judge Hilder properly concluded that CFI could not be compelled to arbitrate its breach of contract claims.

### B. Paragraph 12, As Interpreted by Park West, Does not Provide CFI With a Remedy.

Park West argued below, and continues to argue on appeal, that Paragraph 12 of the Contract provided CFI with "a stipulated remedy" in the event that the parties could not reach "agreement." (See Park West Brief at p. 12). As CFI will explain more fully in the next section of this brief, Paragraph 12 of the Addendum was never intended by the parties to be a mechanism for resolving breach of contract or termination claims. Moreover, Judge Hilder recognized that if Paragraph 12 was interpreted as Park West requests, it would doom CFI "to no remedy, nothing more than to be back where they were before." (R. 763).

Park West suggests that the return of CFI's $50,000 earnest money deposit is a proper remedy for Park West's breach and CFI's resulting loss of a $15,000,000 real estate development opportunity. Although Park West does not use the terminology, its argument suggests that Paragraph 12 is a kind of liquidated damages provision. It is clear, however, that Paragraph 12, as interpreted by Park West, would not survive a liquidated damages analysis.

"Liquidated damages provisions are viewed with some degree of suspicion because they may not reasonably approximate compensatory damages." Robbins v. Finlay, 645 P.2d 623, 625 (Utah 1982). "In determining the validity of a liquidated damages provision, this court has adopted section 339 of the Restatement of Contracts." Woodhaven Apartments v. Washington, 942 P.2d 918, 921 (Utah 1997) (quoting Reliance Ins. Co., 704 P.2d 559, 561 (Utah 1985)). Section 339 provides:

> "(1) An agreement, made in advance of breach fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for breach, unless
>
> (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
>
> (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation."

Id. (quoting Restatement of Contracts § 339 (1932)).

In order to be construed and enforced as a liquidated damages provision, Paragraph 12 must provide a remedy that is a "reasonable forecast of just compensation." Id. "Where the damages provided for in the agreement are disproportionate to the several covenants therein provided, in some cases being grossly excessive and in others entirely inadequate, they will be construed as a penalty rather than as liquidated." DOPP v. Richards, 43 Utah 332, 135 P. 98, 338 (1913) (emphasis added). Accord Warner v. Rasmussen, 704 P.2d 559 (Utah 1985)

(invalidating forfeiture clause in real estate contract that was not a reasonable forecast of damages); Skeen v. Smith, 75 Utah 464, 286 P. 633 (1930) (acknowledging the standard but finding that the stipulated damages were not "entirely inadequate").

Here, Paragraph 12 cannot be interpreted and applied as a liquidated damages provision because the "remedy"—return of the CFI's earnest money deposit—in no way compensates CFI for its damages. As this Court has recognized, "contractual damages are measured by the lost benefit of the bargain, i.e, by 'the amount necessary to place the nonbreaching party in as good a position as if the contract had been performed.'" Young Electric Sign Co. v. Standard West, Inc., 755 P.2d 162, 164 (Utah 1988) (finding that the liquidated damages provision reflected this standard) (quoting Alexander v. Brown, 646 P.2d 692, 695 (Utah 1995). Returning CFI's earnest money deposit clearly would not put CFI in the position it would have been had the contract been performed. In fact, it would not even put CFI in the position it was in prior to making the Contract. Between the time the Contract was executed and the time that it was supposed to close, CFI expended significant time and resources getting ready to build the condominium project contemplated in the Contract. Since Paragraph 12 provides CFI with no meaningful remedy, it cannot be interpreted as a liquidated damages provision and may not be enforced as such. Judge Hilder properly denied Park West's motion.

## II. THE DECISION OF THE DISTRICT COURT SHOULD ALSO BE AFFIRMED BECAUSE PARAGRAPH 12 DOES NOT APPLY TO THE INSTANT DISPUTE.

As previously discussed, Paragraph 12 of the addendum does not provide for meaningful arbitration and, therefore, was not a valid basis for Park West's motion to compel. However, even if Paragraph 12 had provided for meaningful arbitration of "disagreements over

the terms" of the Contract, that provision would not govern CFI's claims for breach of contract and for specific performance.

Sections 15 and 16 of the Contract deal specifically with the resolution of breach of contract and wrongful termination claims. Section 15 provides in pertinent part:

> DISPUTE RESOLUTION. The parties agree that any dispute or claim relating to this Contract, including but not limited the disposition of the Earnest Money Deposit and the breach or termination of this Contract, shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller Mediation Rules of the American Arbitration Association. . . . If mediation fails, the procedures applicable to and remedies available under this Contract shall apply. Nothing in this provision shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court, serving it on the Seller by means of a summons or otherwise permitted by law, and recording a lis pendens with regard to the action provided that the Buyer permits the Seller to refrain from answering the complaint pending mediation. The parties may agree in writing to waive mediation.

(R. 28) (emphasis added). Section 16 of the Contract further provides that if Seller defaults under the Contract, Buyer may "sue Seller for specific performance and/or damages." Id. Paragraphs 15 and 16 of the Contract are drafted broadly to encompass "any dispute or claim relating to this Contract." They are also drafted narrowly to deal with any claims for "breach" or "termination" of the Contract. Paragraphs 15 and 16 were intended to govern the parties' performance of the contract. Those provisions allow CFI to initiate a suit for breach and/or termination so long as CFI allows Park West to refrain from answering the complaint pending mediation.[2]

Unlike Paragraphs 15 and 16 of the Contract, Paragraph 12 of the Addendum was drafted very narrowly and only applies to a "disagreement over the terms of this agreement." Paragraph 12 was intended by the parties to provide an expedited procedure for resolving, in a declaratory

fashion, legitimate disagreements regarding the terms of the Contract. CFI never thought or intended that Paragraph 12 of the Addendum would do away with CFI's constitutional right to pursue its breach of contract claims in the courts. (See Siegel Affid., ¶¶ 30-31, R. 275).

Park West argues that Paragraph 12 of the Addendum was intended to supercede the broader, lengthier and more specific provisions in Sections 15 and 16 of the Contract. This argument is belied by the fact that Park West took the time to cross out from the Contract certain conflicting provisions while allowing all three dispute resolution provisions to remain. Had Park West truly intended all disputes under the Contract to be arbitrated, it would have clearly provided for such and, under no circumstances, would it have allowed Sections 15 and 16 to remain in the Contract.

It would be improper for this Court, as Park West requests, to read Sections 15 and 16 out of the Contract. See Hi-Country Estates Homeowners Ass'n v. Bagley & Co., 928 P.2d 1047 (Utah Ct. App. (1996), cert. denied, 937 P.2d 136 (Utah 1997) (quoting Beuhner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988)). Hi-Country requires the Court to "harmonize all of [the Contract's] provisions and all of its terms, and all of its terms should be given effect if it is possible to do so." Id. at 1053. CFI's interpretation of the Contract is reasonable and harmonizes Sections 15 and 16 of the Contract with Paragraph 12 of the Addendum. Park West's does not. Therefore, the Court must adopt CFI's interpretation and find that Sections 15 and 16 of the Contract remain valid and enforceable.

CFI sued Park West for breaching the specific provisions of the Contract, for breaching its obligations of good faith and fair dealing under the Contract, and for specific performance.

---

[2] CFI's Complaint specifically allowed Park West to refrain from answering the Complaint until the parties had completed their mediation. (R. 4).

(R. 0001-0007). CFI's claims clearly fall within Sections 15 and 16 of the Contract. Therefore, CFI is entitled to pursue its claims against Park West in the courts and Park West's motion must be denied.

## III. THE DECISION OF THE DISTRICT COURT MAY ALSO BE AFFIRMED BECAUSE PARK WEST WAIVED ANY RIGHT IT HAD TO ARBITRATE THIS DISPUTE.

Even if Paragraph 12 of the Addendum to the Contract had provided for meaningful arbitration, which it did not, and even if CFI's claims for breach of Contract had fallen under that provision, which they do not, Park West waived its right to pursue arbitration long before it filed its Motion to Compel.

For four months, Park West took advantage of every benefit that litigation had to offer in the hopes that the trial court would summarily dispose of CFI's claims. Ultimately, the trial court dismissed CFI's claim for specific performance but declined to dismiss its claims for damages. Only when Park West failed to achieve a complete dismissal of CFI's claims in the litigation did Park West decide to shift the remaining claims to arbitration. Having availed itself of the benefits of litigation and having obtained relief from CFI's primary claim for specific performance, Park West is not entitled to remove the remaining claims to arbitration.

This Court has consistently recognized that a party, who might otherwise have the right to arbitrate certain disputes, can waive that right. Chandler v. Blue Cross Blue Shield, 833 P.2d 356, 360 (Utah 1992). In Chandler, the Court recognized that"[t]here is an affirmative duty to enforce contractual rights [and] it is not the policy of this court to allow a party to suffer prejudice because an opposing party has failed to timely assert a contractual right." Id. Chandler adopted a two-prong standard for determining whether a party has waived its right to arbitration. First, the court must consider whether the party claiming the right to arbitrate has "participate[d]

in litigation to a point inconsistent with the intent to arbitrate." Id. Then, the court must determine whether the other party has suffered prejudice as a result of the delay. Id. Each of these standards is met in this case.[3]

### A. Park West's Participated in the Litigation to a Point Inconsistent with the Intent to Arbitrate.

In Chandler, the plaintiff filed an action against Blue Cross. Blue Cross answered Chandlers complaint, "raising seventeen defenses but making no mention of the existence of an arbitration agreement." Chandler, 833 P.2d at 357. Blue Cross also filed cross claims against a co-defendant. Id. Blue Cross then participated in five months of discovery with Chandler. Id. Only then did Blue Cross file its motion to compel arbitration. Id. Based upon these facts the Court found that Blue Cross had participated in litigation to point inconsistent with the intent to arbitrate.

Several of the facts which led to a finding of waiver in Chandler exist in this case. As in Chandler, Park West did not respond to CFI's complaint with a demand for arbitration. Instead, Park West filed an answer with fourteen affirmative defenses, none of which were based upon the alleged arbitration clause. (R. 50-52). As in Chandler, Park West also asserted affirmative claims in the action. Whereas in Chandler those claims were against third parties, here, the claims were made directly against CFI. Park West's Counterclaim asserted five separate causes

[3] In footnote 5 to its brief, Park West suggests that CFI bears a higher standard of proof on the issue of waiver. Park West is wrong. No standard of review applies on the issue of waiver because Judge Hilder did not decide the motion on the basis of waiver. Judge Hilder concluded that he could not order arbitration because there was no bona-fide arbitration option. (R. 763). If he made any findings concerning waiver, those findings were that "there is [sic] certainly actions by the defendant that were inconsistent with the arbitration. On the other hand, there were actions that were consistent. I am not persuaded that waiver applies in this case . . ." (R. 762). In any event, because the facts that support CFI's waiver claim are not disputed, this Court may decide the issue of waiver as a matter of law. See, e.g., Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 940 n.3 (Utah 1993).

of action against CFI and sought declaratory relief and damages on each. (R. 34-34). Significantly, the Counterclaim affirmed both the jurisdiction and the venue of the trial court, (R. 43, ¶¶ 4-7).

This case diverges from the facts in Chandler in that the parties did not get involved in extensive discovery. This fact, however, is not fatal to CFI's argument. Chandler does not purport to define all factual scenarios that constitute waiver. To the contrary, the Court realized that many different fact scenarios would support waiver. Id. at 358-359. This Court relied upon several factually dissimilar cases from other jurisdictions in which other courts have found waiver. Several of those cases are strikingly similar to the facts in this case. See Board of Educ. Taos Mun. Schools v. The Architects, 709 P.2d 184 (N.M. 1985); Wood v. Millers National Ins. Co., 632 P.2d 1163 (N.M. 1981); Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1162 (5th Cir. 1986); Weight Watchers of Quebec Ltd. v. Weight Watchers Internat'l, Inc., 398 F. Supp. 1057, 1060 (E.D.N.Y. 1975). CFI urges the Court to look once again to the foregoing cases, apply the reasoning in those case, and find a waiver here.

The courts in each of the foregoing cases cited in Chandler found a waiver based largely upon the defendant's filing of one or more substantive motions. Board of Educ. Taos Mun. Schools, 709 P.2d 184 (waiver due to filing several substantive motions along with motion to compel arbitration); Wood, 632 P.2d 1163 (waiver due to filing motion for summary judgment); Price, 791 F.2d 1156 (same) Weight Watchers of Quebec Ltd, 398 F. Supp. 1057 (same). As the New Mexico recognized, "[w]aiver of the right [to arbitration] may be inferred from any decision to take advantage of the judicial system, whether through discovery or direct invocation of the court's discretionary power, or both." Id. (emphasis added). "[T]he point of no return is reached when the party seeking to compel arbitration invokes the court's discretionary power,

prior to demanding arbitration, on a question other than its demand for arbitration." Id. at 464 (quoting Wood, 632 P.2d at 1156-66). As the Wood case recognized, this rule is necessary because "[t]o hold otherwise would permit a party to resort to court action until an unfavorable result is reached and then switch to arbitration." Wood, 632 P.2d at 1166. Compare Weight Watchers of Quebec Ltd, 398 F. Supp. at 1061 ("the court has not been pointed to and has found no authority for the proposition that one who answers, seeks summary judgment, and awaits the decision on such a motion to present the question of arbitration for the first time may then compel arbitration.").

In this case, Park West filed a Motion to Dismiss and to Quiet Title. (R. 59-115). Although styled as a motion to dismiss, the motion was supported with nine affidavits. (R. 116-188). The motion did not seek to compel arbitration, but rather, sought a dismissal of all of CFI's claims on the merits. The motion stated:

> This is an action seeking specific performance of a real estate purchase contract that automatically terminated by its own terms over eleven months ago. The contract provided that closing would occur on the earlier of December 31, 1998 or fifteen days after Final Master Plan approval, that the "[e]ntire agreement [was] subject to Summit County Approval of density, zoning and use," and that time was of the essence. Because Summit County never gave its approval, and the transaction failed to close by December 31, 1998, the Purchase Contract automatically terminated by its own terms on December 31, 1998. Therefore, PWA respectfully requests this Court dismiss this action, with prejudice, on the grounds that CFI cannot state a claim upon which relief may be granted.

(R. 60) (emphasis added). At the hearing on its motion to dismiss, Park West made it clear that it was seeking a substantive ruling on all of CFI's claims. Counsel for Park West requested the Court to "dismiss this action and have quiet title in its favor." (R. 662, ll. 21-22). (See also R. 728, l. 20 to 729, l. 1))

On January 14, 2000, the trial court issued a detailed minute entry setting forth its ruling on Park West's Motion to Dismiss. The Court dismissed CFI's primary claim for specific performance but declined to dismiss CFI's claims against Park West for damages. That ruling was reduced to a formal order on February 28, 2000. Having obtained the principal relief it desired from the trial court, Park West then opted to pursue the remaining claims in arbitration. On March 9, 2000, Park West filed its Motion to Compel Arbitration. By invoking the District Court's discretionary power and seeking summary judgment on all of CFI's claims, Park West waived any right it may have had to pursue arbitration.

Finally, Park West engaged in other activities during the litigation, absent in Chandler, which clearly expressed Park West's intent to litigate rather than mediate. On February 4, 2000, Park West participated in a Rule 26(f) attorney's scheduling conference. In that conference, Park West and CFI discussed the nature of the claims and defenses, agreed upon a date for the exchange of initial disclosures and set various dates for the litigation. At no time during the attorney's planning conference did counsel for Park West voice its plan to pursue arbitration. (R. 510-512). On February 4, 2000, Park West's counsel executed and submitted a Scheduling Order to the trial court which order contained no reference to arbitration. (R. 449-451). On March 3, 2000, the parties exchanged their initial disclosures. (R. 478-479). Nowhere in Park West's initial disclosures did Park West indicate its intent to pursue arbitration. All of these actions manifested Park West's intent to pursue litigation rather than arbitration.

Under the analysis in Chandler and the cases cited therein, Park West participated in the litigation to a point inconsistent with the intent to arbitrate.[4] All of Park West's actions satisfy the first prong of the Chandler analysis.

### B. CFI Suffered Prejudice as a Result of Park West's Delay in Moving for Arbitration.

This Court in Chandler identified three forms of prejudice that can result from a defendant's delay in moving to compel arbitration.

> Courts have recognized that prejudice can occur if a party gains an advantage in arbitration through participation in pretrial procedures. Courts have also stated that prejudice exists when the party seeking arbitration is attempting to forum-shop after "the judicial waters [have] . . . been tested." In addition, prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of expenses that arbitration is designed to alleviate, such as the expense of preparing to argue important pretrial motions or the expense of conducting discovery procedures that are not available in arbitration.

Chandler v. Blue Cross Blue Shield, 833 P.2d 356, 359 (Utah 1992) (quoting Wood, 632 P.2d at 1165). "[A]ny real detriment is sufficient to support a finding of prejudice." Id. at 360. Each form of prejudice exists in this case.

---

[4] In its brief, Park West suggests that it preserved its right to arbitrate by sending CFI a letter demanding arbitration and by referencing the right to arbitrate in a few documents filed with the Court. Knowing that one may have a right, and exercising that alleged right, are two very different things. "[T]here is an affirmative duty to enforce contractual rights." Chandler, 833 P.2d at 360 (emphasis added). If Park West intended to arbitrate, it was obligated to do so, rather than to pursue the litigation with CFI. At the hearing on it motion to dismiss Park West acknowledged its "option" of arbitration but clearly made it known that it was holding that option in abeyance. Counsel for Park West stated: ". . . at the very most, all they have, I guess I'm saying, and whether we compel arbitration or not, which is certainly an option we all have, is they have a breach of contract claim for damages." (R.689, ll. 1-4) (emphasis added). Later in the hearing, Park West presented the trial court with two options, neither of which was for arbitration. Park West's counsel stated: "I guess my point is the Court can do one of two things. It can dismiss the case outright, based upon my argument; or two, if it feels they have at least established enough to withstand the motion to dismiss, it can move forward. My suggestion and what I think the law says is that it can only move forward on a claim of damages. . . ." (R. 685, ll. 19-24). Though Park West knew of its alleged right to arbitrate, it consciously chose not to exercise that right until four months into the litigation. That constitutes waiver.

### 1. Park West Has Gained An Advantage in the Arbitration Through Its Use of Pretrial Procedures.

Through its Motion to Dismiss, Park West succeeded in disposing of CFI's claim for specific performance. If, as Park West suggests, all of the disputes regarding the parties' Contract were subject to arbitration, the arbitrator should also have determined CFI's right to specific performance. With the decision of the trial court dismissing CFI's claim for specific performance, and Park West's subsequent development of the Frostwood Parcel with another developer, CFI has lost forever the right to specific performance under the Contract. Clearly, Park West has gained a significant advantage in the arbitration to the great prejudice of CFI. Having taken affirmative advantage of the trail court to eliminate CFI's principal claim, Park West is hardly in a position to complaint about having to litigate CFI's damages claim in the same tribunal.

### 2. CFI Has Been Prejudiced by Park West's Attempts to Forum-Shop.

Park West filed its Motion to Dismiss and to Quiet Title seeking to dispose of all of CFI's claims as a matter of law. Its efforts were only partially successful. CFI's claims for breach of contract and damages remain. Having failed to obtain complete dismissal of CFI's claims, Park West then sought a more favorable forum for the resolution of the remaining claims. A forum in which Park West candidly acknowledges that CFI's only recovery will be the restoration of its $50,000 earnest money deposit—an amount that does not begin to compensate CFI for its damages. As recognized in Chandler, this litigation strategy constitutes prejudice.

### 3. Park West's Delay Has Caused CFI to Incur the Types of Costs that Arbitration Is Designed to Avoid.

CFI was prejudiced by having to respond to Park West's Motion to Dismiss and to Quiet Title. As the Court in Chandler recognized, prejudice may result from "the expense of preparing to argue important pretrial motions." Chandler, 833 P.2d at 359. See also Pledger v. Gillespie, 982 P.2d 572, 577 (Utah 1999) (noting the prejudice that occurs from "incurring expenses that would not have been incurred in arbitration, e.g., preparing to argue important pretrial motions or conducting discovery not available in arbitration."). In addition to the tremendous costs incurred to defend against Park West's Motion to Dismiss and to Quiet Title, CFI incurred additional unnecessary litigation expenses including the costs to meet and confer with Park West, schedule litigation dates, prepare Initial Disclosures, and prepare discovery requests to be served on Park West. CFI was prejudiced from having to incur these additional litigation expenses.

Prior to March 9, 2000, Park West too full advantage of the benefits of litigation. Most significantly, it sought and obtained from the trial court the dismissal of CFI's primary claim for specific performance. Only when Park West failed to obtain the dismissal of all CFI's claims, did it opt to pursue the arbitration of CFI's remaining claims. Park West has cited the Court to no authority, and none exists, in which courts have allowed for a piecemeal arbitration practice. If Park West was entitled to arbitrate the claims in the lawsuit, it was obligated to arbitrate all of those claims, including CFI's claim for specific performance. Because there is no practical way to restore CFI's claim for specific performance and to allow all claims to proceed to arbitration, Park West has lost the right to pursue any claims in arbitration. CFI has demonstrated both prongs of the Chandler waiver test. Judge Hilder could have denied Park West's motion to

compel on the basis of waiver. Therefore, this Court should affirm Judge Hilder's denial of the motion to compel on the additional theory of waiver.

## CONCLUSION

For all of the foregoing reasons, CFI respectfully request this Court to affirm the district court's denial of Park West's Motion to Compel.

DATED this 28th day of December, 2000.

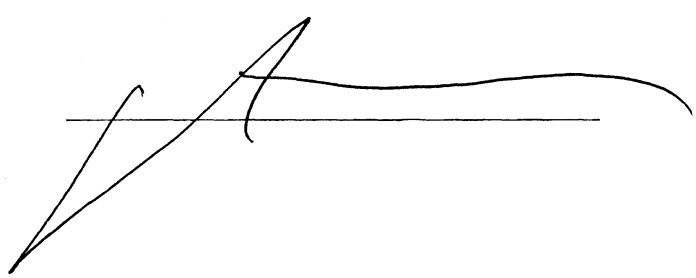
**SNELL & WILMER**

By _____
Robert W. Payne
Attorneys for Plaintiffs/Appellees

## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2000, I caused a true and correct copy of the within and foregoing **BRIEF OF APPELLEES** to be sent to the following, via United States Mail, postage prepaid:

Mark R. Gaylord
Craig H. Howe
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
201 South Main Street, Suite 600
Salt Lake City, Utah 84111-2221



36680.0001\PAYNER\SLC\149828.2

Tab A

Deer Crest Realty
P.O. Box 3268
1375 Deer Valley Drive, Suite 210
Park City, Utah 84060
Phone: (435) 655-0555, Fax: (435) 645-9483

COMMERCIAL - INDUSTRIAL - INVESTMENT

# REAL ESTATE PURCHASE CONTRACT

This is a legally binding Contract. It has been prepared for the use of its members only by the UTAH ASSOCIATION OF REALTORS® in transactions involving members, clients or customers; as such, the interests of Buyer and Seller. Nonetheless, the Buyer and the Seller may legally agree in writing to alter or delete provisions of this form. Seek legal advice from your attorney or tax advisor before entering into a binding Contract.

## EARNEST MONEY RECEIPT

: Buyer

Central Florida Investments, Inc.

ers to purchase the Property described below and delivers as Earnest Money Deposit $ 50,000 in the form of n/a to: the Brokerage, to be deposited within three business days after Acceptance of this Offer to Purchase by all parties. the Title/Escrow Company identified below.

okerage or Title/Escrow Company n/a Address P.O. Box 3268, Park City, Utah

ceived by Brant Ferrin on June 08, 1998 (date) Phone Number 435-655-0555

Title/Escrow Company) for deposit no later than (date) n/a.

n/a

## OFFER TO PURCHASE

PROPERTY:
rosewood, see attached legal description, approximately 20 acres.

ddress At the base of "The Canyons" City n/a County Summit State Utah

r legal description, see ☒ attached Addendum # 1 ☒ preliminary title report when available as provided below.

1.1 INCLUDED ITEMS: Unless excluded herein, this sale shall include all fixtures presently attached to the Property. The following personal property shall lso be included in this sale and conveyed under separate Bill of Sale with warranties as to title:

/a

1.2 EXCLUDED ITEMS: These items are excluded from this sale:

/a

. PURCHASE PRICE AND FINANCING. Buyer agrees to pay for the Property as follows:

: 50,000 Earnest Money Deposit

: 12,500,000 Loan Proceeds:

☐ Representing the liability to be assumed by Buyer under an existing assumable loan (☐with ☐without Seller be released of liability) in this approximate amount with ☐Buyer ☐Seller agreeing to pay any loan transfer and assumption fees. Any net differences between the approximate balance of the loan shown above and the actual balance at Closing shall then be adjusted in ☐cash ☐other n/a

☐ From new institutional financing on terms no less favorable to the Buyer than the following: n/a (interest rate for first period prior to adjustment, if any); n/a (amortization period); n/a (term). Other than these, the loan terms shall be the best obtainable under the loan for which the Buyer applies below.

☐ From Seller-held financing, as described in the attached Seller Financing Addendum.

$ 2950 00
$ ( 500,000 n/a Other: n/a
$ 2,450,000 Balance of Purchase Price in cash at closing

$ 15,000,000 TOTAL PURCHASE PRICE

1. CLOSING. This transaction shall be closed on or before Addendum. Closing shall occur when: (a) Buyer and Seller have signed and delivered to each other (or to the escrow/title company), all documents required by this Contract, by the Lender, by written escrow instructions signed by the Buyer and the Seller, and by applicable law; (b) the moneys required to be paid under these documents have been delivered to the escrow/title company in the form of collected or cleared funds; and (c) the deed which the Seller has agreed to deliver under *Section 6* has been recorded. Seller and Buyer shall each pay one-half of the escrow Closing fee, unless otherwise agreed by the parties in writing. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated as set forth in this *Section*. All deposits on tenancies shall be transferred to Buyer at Closing. Prorations set forth in this *Section*

☐ ☐ ☒



0276

be made as of date of: Closing; di ossession; other N/a

OSSESSION. Seller shall deliver possession to Buyer within 0 hours after Clos.

ONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract the Listing Agent Marion Crosby

esents ☒ Seller ☐ Buyer, and the Selling Agent Brent Ferrin represents ☐ Seller ☒ Buyer. Buyer and Seller

irm that prior to signing this Contract written disclosure of the agency relationship was provided to him/her. ( ) Buyer's initials ( ) Seller's initials.

ITLE TO PROPERTY AND TITLE INSURANCE. (a) Seller has, or shall have at Closing, free title to the Property and agrees to convey such title to er by ☒ general ☐ special warranty deed, free of financial encumbrances as warranted under *Section 10.6*; (b) Seller agrees to pay for, and furnish er at Closing with, a current standard form Owner's policy of title insurance in the amount of the Total Purchase Price; (c) the title policy shall conform t Seller's obligations under *subsections (a)* and *(b)*. Unless otherwise agreed under *Section 8.4*, the commitment shall conform with the title insurance mitment provided under *Section 7.1*.

☒ The Buyer elects to obtain a full-coverage extended ALTA policy of title insurance under *6(b)*. The cost of this coverage, above that of a standard ner's policy, shall be paid for by the ☐ Buyer ☒ Seller. Also, the cost of a full-coverage ALTA survey, shall be paid for by the ☐ Buyer ☒ Seller.

PECIFIC UNDERTAKINGS OF SELLER AND BUYER.

7.1 SELLER DISCLOSURES. The Seller will deliver to the Buyer the following Seller Disclosures no later than the number of calendar days indicated below ich shall be days after Acceptance:

| | (days) |
|---|---|
| ☒ (a) a *Seller Property Condition Disclosure* for the Property, signed and dated by Seller: | 30 |
| ☒ (b) a commitment for the policy of title insurance required under *Section 6*, to be issued by the title insurance company chosen by Seller, including copies of all documents listed as Exceptions on the Commitment: | 30 |
| ☒ (c) a copy of all loan documents relating to any loan now existing which will encumber the Property after Closing: | 30 |
| ☒ (d) a copy of all leases and rental agreements now in effect with regard to the Property together with a current rent roll: | 30 |
| ☐ (e) operating statements of the Property for its last N/a full fiscal years of operation plus the current fiscal year through N/a, certified by the Seller or by an independent auditor: | 30 |
| ☒ (f) tenant Estoppel agreements: | 30 |

ller agrees to pay any charge for cancellation of the title commitment provided under *subsection (b)*.

If Seller does not provide any of the Seller Disclosures within the time periods agreed above, the Buyer may either waive the particular Seller Disclosure quirement by taking no timely action or the Buyer may notify the Seller in writing within 15 calendar days after the expiration of the particular sclosure time period that the Seller is in Default under this Contract and that the remedies under *Section 16* are at the Buyer's disposal. The holder of the arnest Money Deposit shall, upon receipt of a copy of Buyer's written notice, return to the Buyer the Earnest Money Deposit without the requirement of rther written authorization from the Seller.

7.2 BUYER UNDERTAKINGS. The Buyer agrees to:

| | I | II |
|---|---|---|
| ☒ (a) Apply for approval of the assumption or funding of the loan proceeds described in *Section 2* by completing, signing, and delivering to the Lender the initial loan application and documentation required by the Lender and by paying all fees as required by the Lender (including appraisal fee) no later than 15 calendar days after Acceptance; and | | |
| ☒ (b) No later than 30 calendar days after Acceptance, obtain from the Lender to whom application is made under *subsection (a)* a written commitment to approve the assumption of the existing loan or to fund the new loan subject only to changes of conditions in Buyer's credit worthiness and to normal loan closing procedures; or, if Buyer elects, providing the Seller with absolute assurance, within the same time frame, that the proceeds required for funding the Total Purchase Price are available. | | |

hese Buyer Undertakings are at the sole expense of the Buyer and are material elements of this Contract for the benefit of both the Buyer and the Seller.

If Buyer does not initiate any Buyer Undertaking and provide Seller with written confirmation in the time agreed above, the Seller may either waive the articular Buyer Undertaking requirement by taking no timely action or the Seller may notify the Buyer in writing within 30 calendar days of the xpiration of the particular undertaking time period that the Buyer is in Default under this Contract and that the remedies under *Section 16* are at the Seller's lisposal. The holder of the Earnest Money Deposit shall, upon receipt of a copy of Seller's written notice, deliver to the Seller the Earnest Money Deposit without he requirement of further written authorization from the Buyer.

7.3 ADDITIONAL DUE DILIGENCE. The Buyer shall undertake the following Additional Due Diligence elements at its own expense and for its own benefit for the purpose of complying with the Contingencies under *Section 8*:

☒ (a) Ordering and obtaining an appraisal of the Property if one is not otherwise required under *Section 7.2*;

☒ (b) Ordering and obtaining a survey of the Property if one is not otherwise required under *Section 6*;

☒ (c) Ordering and obtaining any environmentally related study of the Property;

☒ (d) Ordering and obtaining a physical inspection report regarding, and completing a personal inspection of, the Property;

☒ (e) Requesting and obtaining verification that the Property complies with all applicable federal, state, and local laws, ordinances, and regulations with regard to zoning and permissible use of the Property.

Seller agrees to cooperate fully with Buyer's completing these Due Diligence matters and to make the Property available as reasonable and necessary for the same.

8. CONTINGENCIES. This offer is subject to the Buyer's approving in its sole discretion the Seller Disclosures, the Buyer Undertakings, and Additional Due Diligence matters in *Section 7*. However, the Buyer's discretion in approving the terms of the loan under *subsection 7.2 (b)* is subject to Buyer's covenant with regard to minimally acceptable financing terms under *Section 2*.

8.1 Buyer shall have 15 calendar days after the times specified in *Section 7.1* and *7.2* for receipt of Seller Disclosures and for completion of

r Undertakings to review the content of th osures and the outcome of the undertakings. The late icable date under *Section 7.1* and *7.2* applies ompleting a review of **Additional Due Diligence** matters under *Section 7.3*.

.2 If Buyer does not deliver a written objection to Seller regarding a **Seller Disclosure, Buyer Undertaking,** or **Due Diligence** matter within the time provided *ection 3.1*, that item will be deemed approved by Buyer.

.3 If Buyer objects, Buyer and Seller shall have 15 calendar days after receipt of the objections to resolve Buyer's objections. Seller may, but shall not equired to, resolve Buyer's objections. Likewise, the Buyer is under no obligation to accept any resolution proposed by the Seller. If Buyer's objections are not lved within the stated time, Buyer may void this Contract by providing written notice to Seller within the same stated time. The holder of the Earnest Money osit shall, upon receipt of a copy of Buyer's written notice, return to Buyer the Earnest Money Deposit without the requirement of any further written orization from Seller. If this Contract is not voided by Buyer, Buyer's objection is deemed to have been waived. However, this waiver does not affect ranties under *Section 10*.

.4 Resolution of Buyer's objections under *Section 3.3* shall be in writing and shall become part of this Contract.

PECIAL CONTINGENCIES. This offer is made subject to:

.1 Seller to provide buyer with all engineering data regarding the Property at llers expense.

9.2 Seller to provide Buyer with Master Plan and initial building design, with input om buyer, for the Property, at sellers expense.

9.3 Seller to provide Buyer with all necessary governmental approvals regarding the operty including Master Plan approval, at sellers expense. the Canyons Area

9.4 A "people mover" that is acceptable to buyer, shall be designed and installed to e center of the property, at no expense to the buyer, on or before 12/1/98.

9.5 Seller shall guarantee that 610,000 sq.ft. will be approved for development on e Property. Buyer, at its sole discretion, has the ability to use a maximum of 1,000 sq.ft. of the total 610,000 sq.ft. as commercial space.

9.6 Buyer is responsible for all of the water shares and/or connections, on the same asis as the seller and other developers involved within the Canyons Master Plan.

9.7 Seller shall apply for, with input from buyer, and obtain Final Master Plan pproval, at sellers expense, on or before ~~July 1, 1998~~. August 31, 1998 or

9.8 This transaction shall close on the earlier of 12/31/98 or 15 days after Final aster Plan approval.

9.9 Entire agreement is subject to Summit County Approval of density, zoning and se.

he terms of attached Addendum # 1 are incorporated into this Contract by this reference.

9. SELLER'S LIMITED WARRANTIES. Seller's warranties to Buyer regarding the Property are limited to the following:

10.1 When Seller delivers possession of the Property to Buyer, it will be broom-clean and free of debris and personal belongings;

10.2 Seller will deliver possession of the Property to Buyer with the plumbing, plumbed fixtures, heating, cooling, ventilating, electrical and sprinkler (indoor nd outdoor) systems, appliances, and fireplaces in working order;

10.3 Seller will deliver possession of the Property to Buyer with the roof and foundation free of leaks known to Seller;

10.4 Seller will deliver possession of the Property to Buyer with any private well or septic tank serving the Property in working order and in compliance with overnmental regulations;

10.5 Seller will be responsible for repairing any of Seller's moving-related damage to the Property;

10.6 At Closing, Seller will bring current all financial obligations encumbering the Property which are assumed in writing by Buyer and will discharge all such obligations which Buyer has not so assumed;

10.7 As of Closing, Seller has no knowledge of any claim or notice of an environmental, building, or zoning code violation regarding the Property which has not been resolved.

11. VERIFICATION OF WARRANTED AND INCLUDED ITEMS. After all contingencies have been removed and before Closing, the Buyer may conduct a "walk-through" inspection of the Property to determine whether or not items warranted by Seller in *Section 10.1, 10.2, 10.3* and *10.4* are in the warranted condition and to verify that items included in *Section 1.1* are presently on the Property. If any item is not in the warranted condition, Seller will correct, repair or replace it as necessary or, with the consent of Buyer and (if required) Lender, escrow an amount at Closing to provide for such repair or replacement. The Buyer's failure to conduct a "walk-through" inspection or to claim during the "walk-through" inspection that the Property does not include all items referenced in *Section 1.1* or is not in the condition warranted in *Section 10*, shall constitute a waiver of Buyer's rights under *Section 1.1* and of the warranties contained in *Section 10*.

12. CHANGES DURING TRANSACTION. Seller agrees that no changes in any existing leases shall be made, no new leases entered into, and no substantial alterations or improvements to the Property shall be undertaken without the written consent of the Buyer.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, or other entity, the person signing this Contract on its behalf warrants his or her authority to do so and to bind Buyer or Seller and the heirs or successors in interest to Buyer or Seller. If the Seller is not the vested Owner of the Property but has control over the vested Owner's disposition of the Property, the Seller agrees to exercise this control and deliver title under this Contract as if it had been signed by the vested Owner.

14. COMPLETE CONTRACT. This instrument (together with its Addenda, any attached Exhibits, and **Seller Disclosures**) constitutes the entire Contract

een the parties and supersedes all prior dea. oetween the parties. This Contract cannot be chang cept by written agreement of the parties.
DISPUTE RESOLUTION. The parties agree that any dispute or claim relating to this Contract, including but not limited to the disposition of the Earnest ey Deposit and the breach or termination of this Contract, shall first be submitted to mediation in accordance with the Utah Real Estate Buyer/Seller iation Rules of the American Arbitration Association. Each party agrees to bear its own costs of mediation. Any Agreement signed by the parties want to the mediation shall be binding. If mediation fails, the procedures applicable and remedies available under this Contract shall apply. Nothing in this ion shall prohibit the Buyer from seeking specific performance by the Seller by filing a complaint with the court, serving it on the Seller by means of mons or as otherwise permitted by law, and recording a *lis pendens* with regard to the action provided that the Buyer permits the Seller to refrain from vering the complaint pending mediation. Also the parties may agree in writing to waive mediation.
DEFAULT. If Buyer defaults, Seller may elect to either retain the Earnest Money Deposit as liquidated damages or to return the Earnest Money Deposit sue Buyer to enforce Seller's rights. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect to either accept from Seller as adated damages a sum equal to the Earnest Money Deposit or sue Seller for specific performance and/or damages. If Buyer elects to accept the liquid damages, Seller agrees to pay the liquidated damages to Buyer upon demand. Where a *Section* of this Contract provides a specific remedy, the parties nd that the remedy shall be exclusive regardless of rights which might otherwise be available under common law.
ATTORNEY'S FEES. In any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorney's fees.
DISPOSITION OF EARNEST MONEY. The Earnest Money Deposit shall not be released unless it is authorized by: (a) *Sections 7.1, 7.2* and *8.3*; (b) arate written agreement of the parties, including an agreement under *Section 15* if (a) does not apply; or (c) court order.
ABROGATION. Except for express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.
RISK OF LOSS. All risk of loss or damage to the Property shall be borne by Seller until Closing.
TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this transaction. Extensions must be agreed to in writing by all parties. formance under each *Section* of this Contract which references a date shall be required absolutely by 5:00 P.M., Mountain Time on the stated date.
COUNTERPARTS AND FACSIMILE (FAX) DOCUMENTS. This Contract may be signed in counterparts, and each counterpart bearing an original nature shall be considered one document with all others bearing original signature. Also, facsimile transmission of any signed original document and retransmission of any signed facsimile transmission shall be the same as delivery of an original.
. ACCEPTANCE. Acceptance occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where ed to indicate acceptance; and (b) communicates to the other party or the other party's agent that the offer or counteroffer has been signed as required.
. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer ☐ AM ☒ PM Mountain Time, June 15, 1998, this offer shall lapse; and the holder of the Earnest Money Deposit all return it to the Buyer.

Central Florida Investments, Inc.
UYER'S SIGNATURE _____ DATE 6/10/98
By: David Siegel

ACCEPTANCE/REJECTION/COUNTEROFFER

☒ Acceptance of Offer to Purchase: Seller Accepts the foregoing offer on the terms and conditions specified above.

Parkwest Associates and Beaver Creek Associates
ELLER'S SIGNATURE _____ DATE _____ TIME _____
By: Walter Plum

☐ Rejection: Seller Rejects the foregoing offer.
_____(Seller's initials) _____(Date) _____(Time)
☐ Counter Offer: Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached Counter Offer # n/a .

al Estate Purchase Contract

Deer Crest Realty
P.O. Box 3268
1375 Deer Valley Drive, Suite 210
Park City, Utah 84060
Phone: (435) 655-0555, Fax: (435) 645-9483

# ADDENDUM NO. 1
# TO
# REAL ESTATE PURCHASE CONTRACT

IS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference
te of June 04, 1998, including all prior addenda and counteroffers, between

Central Florida Investments, Inc.
Buyer, and

Parkwest Associates and Beaver Creek Associates
Seller, regarding the Property located at
rosswood Parcel, located at the base of "The Canyons" ski area.

ne following terms are hereby incorporated as part of the REPC:

. This offer supercedes the Real Estate Purchase Contract dated April 22, 1998.
. Buyer shall purchase approximately 20 acres as prepared by Seller's Architect in Exhibit "A", attached hereto and made a part thereof.
. The Property shall be conveyed by ~~Special~~ General Warranty Deed.
. Seller shall provide Standard Owners Policy at Seller's expense.
. Seller shall provide a copy of the survey prepared by Bush & Guedgell.
. Buyer shall submit Buyer's plan to Summit County simultaneously with Seller's submittal. The plan shall include architecture for a 400 unit timeshare project.
. The design and location of the "People Mover" must be acceptable to the Canyons Resort with installation and cost to be approved by Seller.
. Buyer understands and agrees to the following:
   a) Summit County has stated that its preferred development is timeshare, interval ownership, or hotel/motel.
   b) Seller, on its Master Plan, has an additional 257 units of whole ownership including 62 residential lots, which shall remain such after Buyer's County approvals are received.
   c) Summit County and the Canyons have indicated an overall square foot parameter of approximately ~~650,000 to 850,000~~ 457,800 square feet.
   d) It may be necessary to obtain from Summit County a waiver for the additional square footage in the timeshare portion necessary for Buyers required units.
   e) If the additional square footage cannot be obtained, this contract may be cancelled in writing by either Buyer or Seller.
9. This transaction shall close on the earlier of 15 days after final approval by County of Buyer's timeshare project or December 31, 1998.
10. The release price of either square footage or acreage shall be at 120% of par. All acres shall be released by the Seller only, on a release schedule approved by the Seller.
11. Seller shall "stub" roads to timeshare property on three sides, which are north, south, and east, at Seller's expense. Buyer shall construct all interior roads to serve timeshare project at Buyer's expense.
12. Any disagreement over the terms of this agreement shall be arbitrated by parties agreed upon by both Buyer and Seller. If agreement cannot be reached within 60 days from the beginning of an arbitration process Buyer shall receive its money back and this agreement shall be null and void.
13. Seller shall be responsible for all costs associated with the people mover lift.
14. There shall be no interest on the unpaid balance owed to Seller.

The transaction shall constitute 5 separate closings associated with each release for purposes of allowing the Seller 5 separate 1031 tax deferred exchanges. Each closing shall be paid in cash with an additional 20% being paid as a down payment for the next scheduled closing. See below:

| | | |
|---|---|---|
| Initial Closing Payment ~~Year 1 Payment~~ | $2,450,000 | Due at closing |
| Prepayment | $500,000 | |
| 1st Payment | $2,950,000 | Release 122,000 sq.ft. |
| 1st Year Anniversary Payment ~~Year 2 Payment~~ | $2,500,000 | Due on 1st yr anniversary |
| Prepayment | $500,000 | |
| 2nd Payment | $3,000,000 | Release 122,000 sq.ft. |
| 2nd year Anniversary Payment ~~Year 3 Payment~~ | $2,500,000 | Due on 2nd yr anniversary |
| Prepayment | $500,000 | |
| 3rd Payment | $3,000,000 | Release 122,000 sq.ft. |
| 3rd year Anniversary Payment ~~Year 4 Payment~~ | $2,500,000 | Due on 3rd yr anniversary |
| Prepayment | $500,000 | |
| 4th Payment | $3,000,000 | Release 122,000 sq.ft. |
| 4th year Anniversary Payment ~~Year 5 Payment~~ | $3,000,000 | due on 4th yr anniversary |
| | Release 122,000 sq.ft | any releases |

Buyer may accelerate these payments identified above without penalty.

the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these ms shall control. All other terms of the REPC, including prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same.

Seller ☒ Buyer shall have until 5:00 ☐ A.M. ☒ P.M. Mountain Time June 15, 1998, to accept the terms of this )DENDUM in accordance with the provisions of Section 23 of THE REPC. Unless so accepted, the offer as set forth in this ADDENDUM all lapse.

6/11/98

[ Buyer ☐ Seller Signature Date Time ☐ Buyer ☐ Seller Signature Date Time

ACCEPTANCE/REJECTION/COUNTER OFFER

HECK ONE:

ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counter offer the terms set forth on the attached ADDENDUM NO. n/a.

Signature) (Date) (Time) (Signature) (Date) (Time)

REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

Signature) (Date) (Time) (Signature) (Date) (Time)

Tab B

IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH

ORIGINAL

CENTRAL FLORIDA INVESTMENTS, INC.,

Plaintiff,

vs.

BEAVER CREEK ASSOCIATES,

Defendants.

Case No. 990600361

Hearing
Electronically recorded on
May 17, 2000

BEFORE: THE HONORABLE ROBERT HILDER
Third District Court Judge

APPEARANCES:

For the Plaintiff:

ROBERT W. PAYNE
Nelson/Rasmussen/Christensen
215 South State Street
Suite 900
Salt Lake City, Utah 84111
Telephone: (801)531-8400

For the Defendants:

MARK R. GAYLORD
CRAIG H. HOWE
Ballard/Spahr/Andrews/Inger
One Utah Center, Suite 600
201 South Main Street
Salt Lake City, Utah 84111
Telephone: (801)531-3000

Transcribed by: Beverly Lowe, RPR/CSR/CCT

1771 South California Avenue
Provo, Utah 84606
Telephone: (801)377-0027

Then it goes through and says, "Nothing in this section shall prohibit the buyer from seeking specific performance," and also "The parties may agree in writing to waive mediation." Well, the parties agreed to arbitrate, not to mediate.

THE COURT: Uh-huh. From the first reading of that language, that 60-day provision, it's always troubled me in the back of my mind that when it talked about failure to reach agreement in 60 days, that's more a mediation concept than an arbitration concept. So I don't think it helps -- it's just another confusion to me, but it's a confusion.

MR. GAYLORD: Whether it's a mediation or arbitration concept, your Honor, the key is what's the remedy in the end. What the parties contracted for is whether it's a mediation or an arbitration, what the parties contracted for is the remedy, and that's what's important here.

The remedy is contract -- they get back here this morning, and the contract is null and void if they can't reach an agreement on the terms of the dispute.

THE COURT: But you don't reach an agreement on an arbitration, do you, Mr. Gaylord? It's imposed upon you.

MR. GAYLORD: Ordinarily, yes, your Honor.

THE COURT: Yes, and then it comes to one other issue for me that no one raised directly, but it troubled me, too, as I read. That is, in this case -- I mean, what I said in the

minute entry I think is correct. There was definitely an intent to not let this drag out, but isn't it possible that this is a sham in the sense that if you can -- if this is sort of an agreement thing, if I say, "Arbitrate," you have your 60-day provision, if it can just be dragged out 60 days, it's all over. It could be -- the whole intent could be thwarted.

MR. GAYLORD: Certainly the intent to be thwarted, I guess if there's any cause of action that it stems from, is if there was a bad faith effort in the context of the arbitration.

THE COURT: Yeah.

MR. GAYLORD: If somehow we don't have a reasonable effort to try and reach an agreement. What the arbitration provision provides, I think, is the arbitration provision provides that, look, we have a Real Estate Purchase Contract that was entered into early on in the process. We didn't know what Summit County was going to do. This is what they had hoped for, and if we could meet those terms and conditions based upon a collective effort, not just by Park West, but by CFI.

As the Court may recall, one of the factors the Court looked at in whether specific performance could be implied, is was there an impossibility of performance, and whether or not CFI had complied with its side of the bargain. The Court, I think, found that it didn't. So --

THE COURT: Uh-huh, I remember.

MR. GAYLORD: And so we're sitting at a point where we have two parties who may want to still structure a deal, so they have an arbitration clause that says, "Look, if we don't have the agreement as we've currently written it, we've got an arbitration clause. Let's see if we can sit down and negotiate a new deal."

If we can't, all you're going to do is get back your earnest money. We don't want to have to waste our time fighting over, you know, whether you have what you have, and if they don't, they get a null and void. It's rendered null and void because they don't want to delay it any further, if they can't reach an agreement on what the development will look like.

So that's what the purpose of the agreement was, and that's what both sides will say. Both sides will say that they had an arbitration clause. They put it in there. They agreed to it. Yet they couldn't reach an agreement on an arbitration if there was a dispute over the terms of the contract, because there is a dispute over what happens to the earnest money.

They think they get to file a litigation, pursuant to paragraph 15. Our position is they don't. Why don't they? Because if you look at two things; one, if you look at the addendum, it says, "To the extent the terms of this addendum modify or conflict with any provisions of the RVPC, including all prior addendum counter offers, these terms shall control."

I submit that there was a conflict between these two, because the conflict arises from the disposition of the earnest money deposit. If you look down here, paragraph 12 tells you what the disposition of the earnest money contract is -- money is, if they can't reach agreement on the arbitration. It is, it gets back, and that's it. They say, "No, we can go ahead and file a lawsuit." There's a conflict there.

More importantly is, under subsection 16 of the RAPC it says, "Where a section of this contract provides a specific remedy, the parties intend that the remedy shall be exclusive, regardless of rights, which might otherwise be available under common law."

The exclusive remedy under this arbitration clause is that if they don't reach agreement, it's null and void. That's the remedy. They agreed when they signed the deal that they wouldn't litigate this case, because of the time frames that they were operating under.

Yeah, they want to now bring back 15 and say, "But we can file a lawsuit. If we first mediate, and if we don't have successful mediation, then we're going to proceed with our litigation.

I submit that this was to wipe out paragraph 15, and intended to be a replacement. It's in direct conflict with that, and it can't be read together, and because it can't be read together, it must file the addendum. The addendum is

controlling.

To address the issue of waiver, your Honor, unless the Court has any other questions.

THE COURT: No, I confess I don't. I think I agree with you, and I'll hear argument, that as a general rule, the addendum should control, but if the addendum doesn't really provide anything, then I'm wondering where we are. That's where I'm struggling; if it really does provide an arbitration option.

Generally when we order arbitration we're saying, "This is not going to be your forum. Arbitration is. You are going to get a binding decision out of a neutral partial arbitration," supposedly.

Here, though, it's such a hybrid of arbitration and mediation, with the ability to say that if agreement doesn't occur within 60 days, you've got nothing except -- and maybe this was the intent -- you've got nothing but the earnest money. We're all moving on because the project is paramount thing here. Is that what you're saying?

MR. GAYLORD: Well, in fact, I think that's exactly what Mr. Segal is saying in his affidavit.

THE COURT: Uh-huh.

MR. GAYLORD: He's suggesting in his affidavit that time is of the essence. In the contract it has a time of the essence clause. He says, "Based upon my visit with Brent

Tab C

No.

FILED

DEC 13 1999

Third District Court

By

Deputy Clerk, Summit County

Mark R. Gaylord (#5073)
Craig H. Howe (#7552)
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
One Utah Center, Suite 1200
201 South Main Street
Salt Lake City, Utah 84101-2215
Telephone: (801) 531-3000
Facsimile: (801) 531-3001

Counsel for Defendants, Park West Associates and
Beaver Creek Associates

**THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY**

**STATE OF UTAH**

| | |
|---|---|
| **CENTRAL FLORIDA INVESTMENTS, INC.,** | |
| **Plaintiff,** | **MOTION TO DISMISS AND TO QUIET TITLE** |
| **vs.** | |
| **PARKWEST ASSOCIATES and BEAVER CREEK ASSOCIATES,** | |
| **Defendants.** | **Civil No. 990600361CR** |
| | **Judge Pat Brian** |

Pursuant to Rule 12(b)(6) of the *Utah Rules of Civil Procedure*, defendants, Park West Associates ("**Park West**") and Beaver Creek Associates ("**Beaver Creek**") (collectively "**PWA**"), by and through their counsel, hereby move that the Court enter an order dismissing this action filed by plaintiff, Central Florida Investments, Inc. ("**CFI**"), and releasing the notice of *lis pendens*

recorded against the subject property. This Motion is supported by the accompanying Memorandum in Support of Motion to Dismiss and to Quiet Title.

This is an action seeking specific performance of a real estate purchase contract that automatically terminated by its own terms over eleven months ago. The contract provided that closing would occur on the earlier of December 31, 1998 or fifteen days after Final Master Plan approval, that the "[e]ntire agreement [was] subject to Summit County Approval of density, zoning and use," and that time was of the essence. Because Summit County never gave its approval, and the transaction failed to close by December 31, 1998, the Purchase Contract automatically terminated by its own terms on December 31, 1998. Therefore, PWA respectfully requests that this Court dismiss this action, with prejudice, on the grounds that CFI cannot state a claim upon which relief may be granted.

At a minimum, however, this Court should release the *lis pendens*, which was recorded against the entire seventy-five-acre Frostwood parcel. The *lis pendens* constitutes a wrongful lien under Utah law. In addition, CFI's claims are barred by laches because over eleven months has passed since the Purchase Contract terminated, and PWA has expended valuable time and resources to obtain Summit County's approval of the development of over 7,000 acres within The Canyons Specially Planned Area ("**The Canyons SPA**"). Finally, because the *lis pendens* threatens to irreparably harm the viability of The Canyons SPA in its entirety, the equities dictate that this Court immediately release the *lis pendens*. For these reasons, PWA respectfully requests that the Court grant this Motion.

DATED this 8th day of December, 1999.

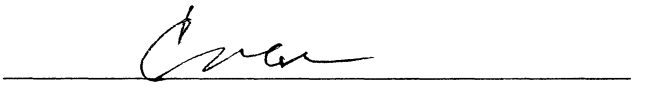
BALLARD SPAHR ANDREWS & INGERSOLL, LLP

Mark R. Gaylord
Craig H. Howe
Attorneys for Park West Associates and
Beaver Creek Associates

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 8th day of December 1999, I caused a true and correct copy of the foregoing **MOTION TO DISMISS AND TO QUIET TITLE** to be mailed by certified mail, return receipt requested, to:

David A. Siegel, President and
Chairman of the Board
Central Florida Investments, Inc.
5601 Windhover Drive
Orlando, FL 32819



Tab D

Alan L. Sullivan (3152)
Robert W. Payne (5534)
Todd M. Shaughnessy (6651)
SNELL & WILMER L.L.P.
111 E. Broadway, Suite 900
Salt Lake City, UT 84111-1004
Telephone: (801) 237-1900
Facsimile: (801) 237-1950

Attorneys for Plaintiff Central Florida Investments, Inc.



**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR**

***SUMMIT COUNTY, STATE OF UTAH***

| | |
|---|---|
| CENTRAL FLORIDA INVESTMENTS, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>PARKWEST ASSOCIATES and BEAVER CREEK ASSOCIATES,<br><br>Defendant. | Case No. 990600361 CR<br><br>**SCHEDULING ORDER**<br><br>Honorable Robert Hilder |

Pursuant to Utah Rule of Civil Procedure 26(f)(3), and by stipulation of the parties and their counsel, the following matters have occurred and/or are scheduled as indicated.

I. ATTORNEY'S SCHEDULING CONFERENCE: Pursuant to Utah R. Civ. P. 26(f)(1), a telephonic meeting was held on February 4, 2000, at 10:00 a.m.

A. The following participated in the telephonic scheduling conference:

Robert W. Payne, Esq. representing plaintiff Central Florida Investments, Inc., and Mark

R. Gaylord, Esq. representing defendants Parkwest Associates and Beaver Creek Associates.

B. The parties have discussed the nature and basis of their claims and defenses.

II. INITIAL DISCLOSURE: On or before March 3, 2000, the parties will exchange information required by Rule 26(a)(1) of the Utah Rules of Civil Procedure.

III. DISCOVERY PLAN: The parties jointly propose to the court the following discovery plan:

A. FACT DISCOVERY

1. All fact discovery will be completed no later than August 31, 2000.

2. Fact discovery will be limited in accordance with Rules 30 and 33 of the Utah Rules of Civil Procedure.

B. EXPERT DISCOVERY

1. Expert discovery shall proceed according to Rules 26(a)(3) and 26(b)(4)(A) of the Utah Rules of Civil Procedure.

2. The identity and Rule 26(a)(3)(B) reports of 's retained experts will be submitted by the parties on or before September 29, 2000.

3. The identity and Rule 26(a)(3)(B) reports of any rebuttal experts will be submitted by the parties on or before November 1, 2000.

4. Depositions of retained experts shall be conducted in accordance with Rule 26(B)(4)(A).

IV. OTHER ITEMS

A. The cutoff date for amending pleadings, including joining of additional parties, is March 30, 2000.

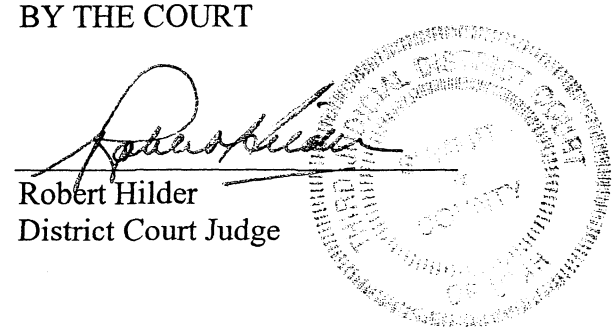
B. The cutoff date for filing dispositive or potentially dispositive motions is February 15, 2001.

C. Pretrial disclosures shall be made in accordance with Rule 26(a)(4) of the Utah Rules of Civil Procedure.

D. The parties request the Court to hold a telephonic Pretrial Conference pursuant to Rule 16 of the Utah Rules of Civil Procedure for the purpose of scheduling dates for the final pretrial conference and for trial of this matter.

DATED this 4th day of February, 2000.

BY THE COURT



Robert Hilder
District Court Judge

APPROVED AS TO FORM:

Mark R. Gaylord
Craig H. Howe
Attorneys for Parkwest Associates
and Beaver Creek Associates

PAYNER\SLC\116465.1